stances of the parties.[11] The weight of authority, however, is to the effect that even in cases of absolute divorce the decree can be reopened.[12] It is correctly pointed out that the decree is not intended as a final disposition of the property, but merely as an enforcement of the right to support; [13] and that the rule relating to the finality of decrees is inapplicable to it, as to all decrees calling for action in the future.[14]

In jurisdictions allowing such revision, the question arises whether the same rule should obtain when the decree has incorporated an agreement of the parties. Such a question is, of course, purely academic in those few states which still insist that any agreement of the parties during the pendency of a divorce suit must be entirely disregarded by the court as against public policy in tending to facilitate divorce.[15] Where the incorporation of such an agreement is allowed, the mere incorporation is sometimes held sufficient to eliminate the possibility of revision.[16] Other courts deny revision on the more rational ground that such incorporation constitutes a recognition of it by the court and makes it binding, provided the married woman had capacity to contract.[17] The soundest view, however, has been adopted, it would seem, by those courts which declare that the decree is not an enforcement of the agreement, but the court's own disposition of the question, which renders it subject to the court's ordinary power of modification.[18] A recent Maryland case, while subscribing to this view, denies revision, nevertheless, on the ground that the agreement incorporated in the decree obviously undertook to give the wife something more than alimony. *Emerson* v. *Emerson*, 45 Chic. Leg. N. 122 (Circ. Ct. of Baltimore City). This refinement, however, would seem to be untenable. For, if the agreement is effective not as an agreement but as part of a decree, the intention of the parties becomes immaterial. Even if the court attempted to produce the same result as that intended by the parties, this decree, like all other decrees for alimony, necessarily includes a provision for support. Therefore since it is to be carried out in the future, it should be subject to the general principles justifying modification of such decrees.

ACTUAL COMPETITION AS AN ESSENTIAL ELEMENT IN UNFAIR TRADE CASES. — In modern times as trade has become more intricate the de-

[11] Walker *v.* Walker, 155 N. Y. 77, 49 N. E. 633; Kamp *v.* Kamp, *supra*.

[12] Stevens *v.* Stevens, 31 Colo. 188, 72 Pac. 1060; Barbaras *v.* Barbaras, 88 Minn. 105, 92 N. W. 522.

[13] Tolman *v.* Leonard, 6 App.Cas. (D. C.) 224, 233. See PHELPS, JURIDICAL EQUITY, § 84.

[14] Keogh *v.* Pittston & Scranton St. Ry. Co., 195 Pa. St. 131; Township of Erin *v.* Detroit & Erin Plank-Road Co., 115 Mich. 465.

[15] Cross *v.* Cross, 58 N. H. 373; Wilson *v.* Wilson, 40 Ia. 230.

[16] Law *v.* Law, 64 Oh. St. 369, 60 N. E. 560. See Olney *v.* Watts, 43 Oh. St. 499, 502, 3 N. E. 354, 356.

[17] Martin *v.* Martin, 65 Ia. 255, 21 N. W. 595; Henderson *v.* Henderson, 37 Or. 141, 60 Pac. 597. On this line of reasoning it has been suggested that, following the analogy of separation agreements, it should be binding even though the wife had no capacity. See 21 HARV. L. REV. 146.

[18] Southworth *v.* Treadwell, 168 Mass. 511; Storey *v.* Storey, 125 Ill. 608.

vices employed by dishonest traders to sell their goods by holding them out to the public as those of well-established manufacturers, have become more ingenious.[1] In order to protect the honest trader, courts of equity have steadily enlarged their jurisdiction.[2] Not many years ago relief would be refused unless infringement of a technical trade-mark could be shown.[3] But the law came to recognize that there was property in a business reputation and that a "passing off" of one's goods as those of another by whatsoever means accomplished was a trespass upon this property. Thus a trader's name,[4] his label,[5] the distinctive dress of his goods,[6] although not themselves property, are symbols of this good-will property, and as such are entitled to protection. Upon this principle it is now well settled that equity will enjoin the use of a trade name where the plaintiff and the defendant deal in precisely the same article.

A novel problem is presented, however, where the plaintiff's trade name is employed in order to sell more readily a commodity of the same general class as those produced by the plaintiff but of a particular variety in which he does not deal. The Circuit Court of Appeals has recently held that no ground for relief is afforded in such a case. *Borden's Condensed Milk Co.* v. *Borden's Ice Cream Co.*, 45 Chic. Leg. N. 121 (C. C. A., Seventh Circ.). The holding is based on the ground that the only instances where the use of a name not a trade mark has been enjoined are those where precisely the same product is sold. But the interposition of chancery in trade-name cases where there is actual competition is not explained by any unique doctrine. It is but an illustration of equity's

[1] See article by Edw. S. Rogers, 3 ILL. L. REV. 551; HOPKINS, UNFAIR TRADE, 1.

[2] Recovery at law for the infringement of a trade-mark seems to have been allowed in an action on the case prior to 1590. See Southern *v.* How, Poph. 143, 144. In 1742 Lord Hardwicke held that a court of equity could not enjoin an infringement of a trade-mark. Blanchard *v.* Hill, 2 Atk. 484. But by 1833 the law had so far advanced that in Millington *v.* Fox, 3 Myl. & C. 338, it was held that an injunction should issue even though an actual fraudulent intent could not be shown. In this country the first instance of equitable interposition to protect a trade-mark seems to have been in 1844. Taylor *v.* Carpenter, 2 Sandf. Ch. (N. Y.) 603. But the doctrine that equity could enjoin a trader from passing off his goods as those of another by means of any device whatsoever is of very recent origin. For some of the earliest cases see Croft *v.* Day, 7 Beav. 84 (1843); Avery & Sons *v.* Meikle & Co., 81 Ky. 73 (1883); Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142.

[3] See Stokes *v.* Landgraff, 17 Barb. (N. Y.) 608 (1853); Condee, Swon & Co. *v.* Deere & Co., 54 Ill. 439 (1870).

The distinction between a trade-mark and a trade name is often lost sight of by the courts. A technical trade-mark must be actually affixed to an article sent out into commerce. A generic descriptive or a geographical term cannot be a technical trade-mark. The fact that a trade-mark is not registered does not hinder it from being a valid trade-mark, nor is the converse true. A trade name on the other hand is the name employed in trade to designate a particular business, or a certain article of commerce; there are no restrictions as to the kind of name that may be employed. The same term frequently is a trade-mark as well as a trade name. See PAUL, TRADE-MARKS, § 160; BROWNE, TRADE-MARKS, 2 ed., §§ 91–141.

[4] Alligretti Chocolate Cream Co. *v.* Keller, 85 Fed. 643; Chickering *v.* Chickering & Sons, 120 Fed. 69; Walter Baker & Co. *v.* Sanders, 80 Fed. 889.

[5] Kronthal Waters *v.* Becker, 137 Fed. 649; Kostering *v.* Seattle Brewing & Malting Co., 116 Fed. 620.

[6] New England Awl & Needle Co. *v.* Marlborough Awl & Needle Co., 168 Mass. 154, 46 N. E. 386; Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed. 1000.

protection of property from irreparable injury occasioned by unfair business methods or practices. That this injury is threatened even in the absence of direct competition seems clearly demonstrable. The purchasing public will hardly know how many different products belonging to the same general class the owner of a valuable trade name may prepare and sell under that name. Surely the widespread belief that a trader sells a faulty, fraudulent, or even mediocre article would injure his business reputation and good will.[7] It is also evident that the plaintiff has acquired a good will in goods of the same class as those he sells but of a different variety; and that this will not be available to him, for sale to others, or if he subsequently desires to add that particular variety to his general line. It seems a short step for equity to extend protection to this property.[8]

Furthermore, this is not in substance an extension of the existing law.[9] In cases involving technical trade-marks it is now generally held that a trade-mark used on one article cannot be appropriated by the maker of another article belonging to the same genus.[10] Now the modern tendency is not to differentiate with nicety between a trade-mark and a trade name, but in every case to consider whether injury has been done to the plaintiff's property in good will.[11] Therefore it may well be argued that these trade-mark cases should be not merely close analogies but governing authorities.[12]

In cases where a defendant has not yet begun to use the disputed

---

[7] In cases involving imitation of a trade-mark this deception of the public has been held to occasion damage. See American Tobacco Co. *v.* Polacsek, 170 Fed. 117; Carroll *v.* Ertheiler, 1 Fed. 688; Wamsutta Mills *v.* Allen, 12 Phila. (Pa.) 535; Bass *v.* Feigenspan, 96 Fed. 206.

Nor should the excellence or genuineness of the defendant's commodity prevent the interference of equity, because the defendant has no right to subject the plaintiff to the danger of future deterioration in the quality of goods over which he has no control. In the analogous trade-mark cases the relative merit of the counterfeit article is not inquired into. See cases cited *supra*.

[8] This element of damage has been taken into account where the passing off was accomplished by means of an imitation of a trade-mark. Collins *v.* Oliver Ames & Sons Corporation, 18 Fed. 561. But see Celluloid Manufacturing Co. *v.* Reed, 47 Fed. 712.

[9] In an English case where the plaintiffs had sold cameras that could be attached to bicycles under the trade name of Bicycle Kodak cameras, the defendants were restrained from selling bicycles under the name of Kodak bicycles. Eastman Photographic Materials Co., Ltd., *v.* John Griffith Cycle Corporation, Ltd., 15 R. P. C. 105. See also Eno *v.* Dunn, 15 App. Cas. 252. But *cf.* Joseph Lucas, Ltd., *v.* Fabry Automobile Co., Ltd., 23 R. P. C. 33.

[10] In trade-mark cases the following commodities have been held to be in the same class: cigarettes and smoking tobacco, American Tobacco Co. *v.* Polacsek, 170 Fed. 117; muslin and shirts made out of muslin, Wamsutta Mills *v.* Allen, 12 Phila. (Pa.) 535; liniment and medicated soap, Omega Oil Co. *v.* Weschler, 35 N. Y. Misc. 441, 71 N. Y. Supp. 983. There have been cases on this very point which the courts in their anxiety to do equity have termed trade-mark cases when in fact there was only a question of "unfair trade" involved. See Amoskeag Manufacturing Co. *v.* Garner, 54 How. Pr. (N. Y.) 297; Collins *v.* Oliver Ames & Sons Corporation, 18 Fed. 561. See BROWNE, TRADE-MARKS, 2 ed., § 67.

[11] See HOPKINS, UNFAIR TRADE, 1, 23, 28; HESSELTINE, LAW OF TRADE-MARKS AND UNFAIR TRADE, xliv; PAUL, TRADE-MARKS, § 23.

[12] Within this rule goods might be said to be in the same class whenever the use of a symbol would enable an unscrupulous dealer to pass off spurious goods upon purchasers as genuine goods made by a well-known dealer.

trade name the arguments in favor of the interference of equity seem doubly cogent. To refuse relief may cause the plaintiff irreparable injury, while granting the injunction works no forfeiture upon the defendant, since under any other name the true merits of his wares will as well appeal to the public.

EFFECT ON INCOMPLETE RELEASE OF APPOINTMENT OF DEBTOR AS EXECUTOR. — Where an incomplete transaction *inter vivos* presents clear evidence of an intention to make a gift or to release a debtor, the English courts in general have held that the appointment of the intended donee or debtor as executor perfects the gift or release.[1] The vesting of the legal title to the estate in the executor is considered to supply the necessary legal formalities and to complete the transaction. But to deal adequately with the problem it is necessary to examine more closely the principles upon which this result may be reached in each of the two types of cases.

The testator's will at his death gives the legal title of all his personal property to his executor in trust for the fulfilling of certain duties. Under the early law the executor was presumed to take an absolute property in the residue.[2] Later it was provided by statute in England that it should be conclusively presumed that the executor take no beneficial interest, but hold any residue in trust for the next of kin or residuary legatee, and this presumption could be rebutted only by evidence on the face of the will.[3] It is submitted that under such a statute, the effect of making the intended donee executor would not be to complete the gift, since a contrary intent is implied into the will by what is in effect a statutory rule of construction.[4] In America a similar result would probably be reached, even in the absence of a specific statute, by a construction of the will itself.[5]

---

[1] Strong *v.* Bird, L. R. 18 Eq. 315 (release); *In re* Applebee, [1891] 3 Ch. 422 (release); *In re* Griffen, [1899] 1 Ch. 408 (release); *In re* Stewart, [1908] 2 Ch. 251 (gift of bonds). *Contra, In re* Hyslop, [1894] 3 Ch. 522 (release); Battle *v.* Knocker, 46 L. J. Ch. 159 (gift of a house). *Cf.* early cases, Byrn *v.* Godfrey, 4 Ves. 5 (accord); Wekett *v.* Raby, 2 Bro. P. C. 386 (*contra*); Brown *v.* Selwin, 3 Bro. P. C. 607 (*contra*). *Cf.* Sibthorp *v.* Moxon, 3 Atk. 579.

[2] The presumption that the executor took beneficially could not be defeated by parol evidence, to make him trustee of the residue for the next of kin. White *v.* Williams, 3 Ves. &. B. 72. If, however, a non-conclusive contrary intention seemed to be shown on the will, parol evidence could be brought in to show the testator's real intention. Walton *v.* Walton, 14 Ves. 318; Mallabar *v.* Mallabar, Cas. *t.* Talb. 78. See STORY, EQUITY JURISPRUDENCE, 13 ed., § 1208, n. 1.

[3] 11 GEO. IV. & 1 WM. IV., c. 40; Love *v.* Gaze, 8 Beav. 472.

[4] Battle *v.* Knocker, *supra. Contra, In re* Stewart, *supra.* Where a residuary legatee is appointed, the use of parol evidence to deprive him of part of the residue would be clearly against the Wills Act.

[5] See note 10, *infra.* The particular question under discussion does not seem to have arisen in America, but either by express statute, by construction of the Statute of Distribution, or by decision, the executor in most states must hold any residue in trust for the next of kin, and parol evidence would probably not be admitted to effect a different result. Paup *v.* Mingo, 4 Leigh (Va.) 163; Hays *v.* Jackson, 6 Mass. 148, 152; Nickerson *v.* Bowly, 49 Mass. 424, 431; Hill *v.* Hill, 2 Hayw. (S. C.) 298; Dunlap *v.* Ingram, 4 Jones Eq. (S. C.) 178; Broome *v.* Alston, 8 Fla. 307; Chamberlin's Appeal,